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Supreme Court of the United States
OCTOBER TERM, 1942

No. 596

GALBAN LOBO COMPANY, S. A.

Petitioner,

—vs.—

LEON HENDERSON,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES EMERGENCY COURT OF APPEALS

BAER & MARKS,
Attorneys for Petitioner.

DONALD MARKS,
JULIUS B. BAER,
Of Counsel.



INDEX

	PAGE
PETITION FOR WRIT OF CERTIORARI	1
Statement of Proceedings in Court Below	1
Statement of Opinion Below	2
Jurisdiction	2
Summary Statement of Matter Involved	2
Principal Questions Presented	4
Statute, Orders and Schedules Involved	5
Reasons for Granting Writ of Certiorari	5
Conclusion	7
BRIEF FOR PETITIONER GALBAN LOBO COMPANY, S. A. .	9
Specifications of Errors To Be Urged	9
Chronological Statement	10
Authorities and Argument	11
I. Petitioner's protest was filed within sixty days of the date when grounds therefor arose	11
II. Plaintiff has been deprived of its property without due process of law in violation of the Fifth Amendment of the Constitution	15
Conclusion	18
Appendix	19

	PAGE
<i>Statutes Cited:</i>	
The Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress, Second Session, approved January 30, 1942)	1, 19
Section 2 (h)	16, 19
Section 4 (a)	15
Section 203	1
Section 203 (a)	2, 19
Section 204	1
Section 204 (a)	20
Section 204 (d)	2

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*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and to the Associate Justices of the
Supreme Court of the United States:*

The above named petitioner, by the undersigned, its attorneys, respectfully prays that a Writ of Certiorari to the United States Emergency Court of Appeals may issue to review the judgment of that Court made on the 19th day of November, 1942, in the above mentioned cause.

Statement of Proceedings in Court Below.

This cause arose under the provisions of Sections 203 and 204 of The Emergency Price Control Act of 1942 (Public Law No. 421, 77th Congress, Second Session, approved January 30, 1942). Petitioner on June 1st, 1942 filed with the Office of Price Administration a petition protesting against an interpretation of Revised Price Schedule No. 16 as applied to the facts of the case, and requesting permission to collect the contract price from the buyer. The protest

was filed pursuant to Section 203 (a) of The Emergency Price Control Act (Tr. 1-20*). On July 1, 1942, the Price Administrator issued an order dismissing said petition and protest because it was not filed within sixty days of the date when the grounds for protest arose (Tr. 21, 22).

Petitioner thereafter filed its complaint against the Price Administrator in the United States Emergency Court of Appeals protesting said order of dismissal. On November 19, 1942, the United States Emergency Court of Appeals rendered its decision dismissing petitioner's complaint, holding that Complainant's grounds of protest arose on March 16, 1942 and that its petition filed on June 1, 1942 was rightly dismissed by the Price Administrator as out of time under Section 203 (a) of the Act.

Statement of Opinion Below.

The opinion of the United States Emergency Court of Appeals is not yet officially reported. A copy thereof is set forth at length in the Record.

Jurisdiction.

The judgment of the United States Emergency Court of Appeals was entered on November 19, 1942. The jurisdiction of this Court is invoked under Section 204 (d) of the Emergency Price Control Act of 1942.

Summary Statement of Matter Involved.

On February 28, 1942, petitioner entered into a contract with the American Sugar Refining Company for the sale of 12,205 bags of Cuban Centrifugal Sugar, crop of 1941, at 2.65¢ per pound F. A. S. Puerto Tarafa, Cuba. The contract price was the Cuban equivalent at that time of the maximum price of 3.74¢ per pound "duty paid cost and

* References to Transcript pages are to the original page numbers of the Transcript of proceedings before the Price Administrator.

freight basis" New York established by Revised Price Schedule No. 16 effective February 11, 1942. The contract provided that the sugar should be shipped per "S. S. YILDUM", "expected to commence loading about March 13th to March 16th, 1942, to New York, Philadelphia, or Baltimore." The "S. S. YILDUM" was delayed and did not arrive at Puerto Tarafa for loading until the latter part of March. She was loaded on March 30th and sailed April 4, 1942.

The "S. S. YILDUM" was under charter to American Sugar Refining Company and petitioner had nothing to do with the payment of freight, nor was it concerned with the movement of the sugar after its delivery at ship's side. Such a contract was not contrary to the terms of Revised Price Schedule 16, and the Court below tacitly assumes that F. A. S. terms were permissible. This was necessarily so in view of the injunction of the Statute (Sec. 2 h) that the "business practices" of an industry should not be changed by the Price Administrator.

On March 12th, the War Shipping Administration issued Rate Order No. 12 effective March 16th which authorized a 22% surcharge on ocean freight rates for transporting sugar from Cuba to United States Atlantic and Gulf ports.

On or about April 9, 1942 the Refining Company refused to pay the contract price of 2.65¢ per pound on the ground that Revised Price Schedule No. 16 required a reduction of the F. A. S. price by an amount equal to the 22% freight surcharge authorized by the War Shipping Administration.

This surcharge was absorbed by the Defense Supplies Corporation on shipments of 1942 crop sugar. Application was made to that agency for similar treatment of the "YILDUM" shipment, but the request was denied as to 1941 crop sugar.

On April 22nd, petitioner and the Refining Company jointly addressed a letter to the Office of Price Administration asking whether, without violating Revised Price Schedule

No. 16, the Refining Company might pay petitioner 2.65¢ per pound for the sugar. On May 4th the Office of Price Administration replied by letter stating that the contract price would have to be reduced by an amount equivalent to the 22% surcharge in order to comply with Revised Price Schedule No. 16. On June 1st, petitioner filed its protest against this interpretation and application of the provisions of the Price Schedule. The protest was dismissed on July 1st and petitioner's complaint was filed in the Emergency Court of Appeals within thirty days thereafter.

The 22% surcharge on freight was billed to the Refining Company, the charterer of the "S. S. YILDUM". It does not appear what the charter of the ship cost the Refining Company, nor what the net effect of the 22% surcharge was on the cost of transporting this particular sugar to destination. The Refining Company claimed, however, that the contract price should be reduced by the amount of the surcharge on the normal freight rate from the port of origin to New York.

The reduction of the F. A. S. price required by the ruling of the Price Administrator of May 4, 1942 amounted to .0748¢ per pound, resulting in a payment by the Refining Company of 2.5752¢ per pound instead of 2.65¢ per pound, or \$3017.66 less than the contract price.

Principal Questions Presented.

1. Did the sole grounds for petitioner's protest arise on March 16, 1942 when the surcharge on freight ordered by the War Shipping Administration became effective?
2. Was the dismissal of the protest and the failure of the Price Administrator to grant petitioner a hearing of its protest on the merits a denial of due process of law under the Fifth Amendment of the Constitution of the United States?

3. Did the United States Emergency Court of Appeals properly dismiss the complaint in this case?

Statute, Orders and Schedules Involved.

The pertinent Statute, Rate Order No. 12 of the War Shipping Administration, and Amendment No. 11 to Price Schedule No. 58 will be found in the Appendix (pp. 19-22). The pertinent order dismissing petitioner's Protest, and Revised Price Schedule No. 16 will be found in the Record (Tr. pp. 21 to 29).

Reasons for Granting Writ of Certiorari.

The Court below has held that the mandate of the Price Schedule was so clear and unambiguous that on March 16, 1942 petitioner must have known that the order of the War Shipping Administration affected its contract with the Refining Company. This ignores the realities and leads to an inequitable and unnecessarily harsh result.

On March 16, 1942 the contract between petitioner and the Refining Company was an open commitment, as the "YILDUM" had not yet arrived at Puerta Tarafa. As of that date, the parties could not know whether the "YILDUM" would arrive within the next sixty days. According to the Court below, petitioner had only sixty days from March 16th within which to file protest. But it is a fundamental rule that a statute of limitations begins to run only when the claimant has a matured cause of action for which a remedy may be sought in a proper tribunal. Here petitioner did not have a matured basis of protest on March 16, and could not have stated in a petition to the Office of Price Administration what effect if any the surcharge order might have on the then open contract. Hence that date did not mark the beginning of its period of limitation. The Court below rested its decision on the finding that petitioner

should have known on March 16 that its open contract would be affected by the surcharge order, and that it was therefore chargeable with the duty to protest, beginning on that date. Even from this point of view the ruling is erroneous.

Can it be said that on that date a reasonable man should have understood that his time to protest had begun to run? To come to such a conclusion a man must have assumed (1) that the vessel will arrive and sail while the surcharge is in effect; (2) that the surcharge will apply to the shipment regardless of the terms of the charter party held by the buyer; (3) that the surcharge will not be absorbed by the Defense Supplies Corporation; and (4) that an F. A. S. contract, permissible and valid when made, may constitutionally be invalidated by a subsequent extrinsic event.

These are all assumptions that do not depend upon the wording or clarity of the Price Schedule. Despite its unambiguity as construed by the Court below, petitioner could not anticipate the effect of the surcharge order upon this contract. There was nothing to protest until that effect became apparent. This took place not earlier than the date of the refusal of the Refining Company to pay the contract price; or, in the alternative, as urged by petitioner, on the date when the Price Administrator ruled in response to a joint inquiry that the contract price must be reduced. In either case, petitioner was within the short statute of limitations fixed by the law.

Such a short statute of limitations should be applied with fairness and with consideration of the practical point of view of the business man affected. In addition to the harshness of the result reached by the Court below, a serious constitutional question is presented. An F. A. S. contract by its terms places upon the buyer all risks of increased transportation costs after delivery at ship's side. The Court below has assumed that such a contract was valid under the Price Schedule. If it was, petitioner had the

right on March 16th to assume that its terms were not impaired by the surcharge order of the War Shipping Administration. The result below, however, is based upon the premise that the F. A. S. terms were affected by the surcharge order, and that petitioner should have assumed that legal result on March 16th. There is no constitutional basis for the conclusion that a contract permissible and valid when made can be so invalidated by a subsequent extrinsic event.

Although petitioner raised this constitutional question below, the Court did not pass upon it in its opinion. The premise of the Court below is of grave constitutional import. This question should, therefore, be reviewed by this Court.

CONCLUSION.

For the reasons indicated above, as elaborated in the brief annexed hereto, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Emergency Court of Appeals to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Emergency Court of Appeals may be reversed, and that your petitioner may have such further and other relief as this Court may deem proper in the premises.

Respectfully submitted,

BAER & MARKS
Attorneys for Petitioner.

By: DONALD MARKS

Dated, New York, N. Y., December 14, 1942.

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

DONALD MARKS, being duly sworn, deposes and says: That he is a member of the firm of Baer & Marks, maintaining offices at 20 Exchange Place, Borough of Manhattan, City and State of New York; that he is a member of the bar of the Supreme Court of the United States and is an attorney for Galban Lobo Company, S. A., which was the plaintiff in the proceeding before the United States Emergency Court of Appeals in the above entitled matter; that he makes this verification on behalf of Galban Lobo Company, S. A. as petitioner herein; that affiant has read the foregoing petition, as the attorney for said plaintiff Galban Lobo Company, S. A. and has knowledge of this litigation; that the matters stated in said petition are true to the best of his knowledge, information and belief; that the foregoing petition is well founded and entitled to a favorable consideration of this Court and that it is not interposed for the purpose of delay.

DONALD MARKS

Subscribed and sworn to before me
thisst 14th day of December, 1942.

ROSE HOFFMAN

Notary Public, Kings County
Kings Co. Clk's No. 402 Reg. No. 3106
N. Y. Co. Clk's No. 317 Reg. No. 3H214
Commission Expires March 30, 1943

